

Mason Papers: Selected Articles and Speeches by Sir Anthony Mason AC, KBE, Geoffrey Lindell (ed), [Sydney, Federation Press 2007 Hardback, 448pp, AU\$80] ISBN 9781862876521

Judicial biographies and memoirs are scarce in Australia.¹ Unlike in the United States, scholars have only occasionally devoted entire books to the life of an Australian judge.² The judges themselves have been even less forthcoming.³ Some would not lament such a dearth.⁴ However, in an age where judges seem to admit the role of personal values in their decision-making,⁵ biographies and memoirs should enhance lawyers' understanding of their field.⁶

Where a great judge, such as Sir Anthony Mason, has not yet caught the attention of a biographer, or performed a similar task himself, the lawyer still has one important source of insight beyond reported cases: extra-judicial writings. There may be limits on how far it is appropriate for judges to make such pronouncements off the Bench.⁷ Nonetheless, it has long been a practice of the Australian judiciary and can provide useful glimpses of thinking and character that would otherwise remain hidden.

The downside for the curious is that extra-judicial writings will usually be scattered across a range of publications. Even in the digital era, it can be laborious to locate and digest all pieces by a particular judge.⁸ The problem deepens the more prolific he or she has been. Fortunately, in a handful of cases, Australian publishers have released books that collect the most significant extra-judicial writings of a judge in a single volume.

¹ M. D. Kirby, "Sir Edward Aloysius McTiernan 1892--1990: Parliamentarian and Judge" (1990) 64 ALJ 320 at 321.

² See, for example, D. Marr, *Barwick* (Sydney, Allen & Unwin, 1980); Z. Cowen, *Isaac Isaacs* (rev ed, St Lucia, UQP, 1993) and P. Ayres, *Owen Dixon: a Biography* (Melbourne, MUP, 2003). Journal articles have been somewhat less rare: P. Girard, "Judging Lives: Judicial Biography from Hale to Holmes" (2003) 7 *Australian Journal of Legal History* 87 at 89, 98.

³ See, for example, G. Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* (Sydney, Federation Press, 1996).

⁴ See, for example, R. Posner, "Objectivity and Hagiography in Judicial Biography" (1995) 70 *NYU L Rev* 502.

⁵ See, for example, *Dietrich v R* (1992) 177 CLR 292 at 319 per Brennan J; M. McHugh, "Swearing in of Justice McHugh" (1988) 83 ALR xxii at xxiii.

⁶ J. Thomson, "Judicial Biography: Some Tentative Observations on the Australian Enterprise" (1985) 8 *UNSWLJ* 380 at 382.

⁷ J. Thomson, "Extra-judicial writings" in *Oxford Companion to the High Court of Australia* (Sydney, OUP, 2001). See also R. Smyth, "Judges and Academic Scholarship: An Empirical Study of the Academic Publication Patterns of Federal Court and High Court Judges" (2002) 2 *QUTLJ* 198.

⁸ Note, though, that the High Court of Australia has taken the helpful step of collecting many extra-judicial pronouncements by its judges on its website: http://www.hcourt.gov.au/publications_05.html (visited 16 June 2008).

The most famous of these is *Jesting Pilate*,⁹ containing many of the articles and speeches produced by Sir Owen Dixon. It has regularly been cited by the High Court of Australia,¹⁰ and has also been utilized by courts in England¹¹ and Hong Kong.¹² More recently, we have seen *Through the World's Eye*,¹³ gathering a number of speeches by Justice Michael Kirby. It has also been cited in argument before his Honour's court.¹⁴ This reception demonstrates the benefit to lawyers of both extra-judicial writings and single volumes.

The Mason Papers,¹⁵ edited by Australian academic Geoffrey Lindell, is a welcome addition to this grouping.¹⁶ Sir Anthony's extra-judicial output throughout his career would put many a full-time academic to shame. As Lindell notes,¹⁷ the judge has given us:

- 36 contributions to books;
- 160 pieces in legal periodicals;
- over 200 speeches; and
- a significant number of press interviews.¹⁸

Such a vast contribution gives rise to a potential disadvantage in compiling a single volume: significant works may be omitted. Lindell meets this point by mentioning the criteria for inclusion of one of Sir Anthony's works in *The Mason Papers*.¹⁹ Of prominence are works in which Sir Anthony reflected upon judicial method and the role of the bench in the wider context

⁹ S. Woniarski, (ed), *Jesting Pilate: and other papers and addresses* (Melbourne, LBC, 1965). This book should not be confused with *Jesting Pilate: Diary of a Journey* (London, Chatto and Windus, 1957) and *Jesting Pilate: an Intellectual Holiday* (Westport, Greenwood Press, 1974), both of which were written by Aldous Huxley.

¹⁰ See, for example, *Roach v Australian Electoral Commissioner* [2007] 239 ALR 1 at 3 (Gleeson CJ).

¹¹ *Fawdry & Co. v Morfitt* [2003] QB 104 at 112 (Hale LJ)

¹² *Re: Chiu Tat-Cheong, David* [1992] 2 HKLR 57 at 73 (Kaplan J).

¹³ C. Sampford, S. Blencow and S. Condlin (eds), *Through the World's Eye* (Sydney, Federation Press, 2000).

¹⁴ *ABC v Lenah Game Meats* [2001] 208 CLR 199 at 206.

¹⁵ G. Lindell, (ed), *The Mason Papers: selected articles and speeches by Sir Anthony Mason AC, KBE* (Sydney, Federation Press, 2007).

¹⁶ Indeed, although it was launched less than a year ago, the book has already been cited by the High Court: *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2008] 82 ALJR 345 at 367 (Kirby J).

¹⁷ Lindell, *Mason Papers*, (n 15 above), pp 1-2.

¹⁸ There is a list of all these works as a supplement to Lindell, *Mason Papers*, (n 15 above), at <http://www.federationpress.com.au> (visited 16 June 2008). Since the book was launched by Prof Leslie Zines in November 2007, Sir Anthony's output has continued unabated: see, for example, the entertaining "Opening of Law Term Judges' Dinner", NSW Supreme Court, 31 January 2008: http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_speeches (visited 17 June 2008).

¹⁹ Lindell, *Mason Papers*, (n 15 above), pp 8-9. Note that Lindell also provides an illuminating discussion of the propriety of extra-judicial writing, *Ibid.* pp 5-6.

of Australian government.²⁰ Then there are works detailing Sir Anthony's pioneering interest in the use of international and comparative law by Australian courts.²¹

Lindell also thought it important to include Sir Anthony's remarks on the role of academic lawyers²² and practicing appellate advocates,²³ together with a solitary non-legal piece on the vision of Prime Minister Alfred Deakin and its implications for contemporary Australia.²⁴ Alongside these somewhat eclectic entries appear Sir Anthony's writings on the law of contract²⁵ and equity.²⁶ Lastly, there are Sir Anthony's views on controversial issues of constitutional reform in Australia, namely the introduction of a bill of rights²⁷ and the establishment of a republic.²⁸

The arrangement of the chapters is somewhat haphazard. However, Sir Anthony's lucid and accessible prose shines through. The book is enjoyable simply to dip into. It is a delight to reread Sir Anthony's classic piece, "The use and abuse of precedent".²⁹ It was one of the first journal articles given to the author at law school. More than a decade later, the same article appears on the reading lists of law students in Hong Kong. It may now be twenty years old. However, it shows no sign of losing its utility.

The thematic heart of the book seems to be Sir Anthony's conception of the judicial function, appearing, in one form or another, within the majority of the reproduced works. This is where extra-judicial writing can be most beneficial. A judge might, by way of a published piece, gently suggest reform in a particular area of the law.³⁰ However, the same result could often be achieved by some carefully placed obiter in a judgment. There is probably less scope for judges, in their daily work, to reflect at length upon their understanding of their constitutional role. Extra-judicial writing bridges the gap.

Sir Anthony's outlook on judicial work is often contrasted with the views of Sir Owen Dixon. Indeed, in his introduction, Lindell talks of Sir Anthony's quest to find a flexible and contemporary alternative to Sir

²⁰ See for example, *Ibid.* Ch 3 "The role of the judge at the turn of the century"; Ch 4 "Legislative and judicial law-making: Can we locate an identifiable boundary?".

²¹ *Ibid.* Ch 16 "The influence of international and transnational law on Australian municipal law".

²² *Ibid.* Ch 21 "Legal research: Its function and its importance".

²³ *Ibid.* Ch 24 "The role of counsel and appellate advocacy".

²⁴ *Ibid.* Ch 14 "Deakin's vision, Australia's progress".

²⁵ *Ibid.* Ch 18, "Themes and tensions underlying the law of contract".

²⁶ *Ibid.* Ch 19, "The place of equity and equitable remedies in the contemporary common law world".

²⁷ *Ibid.* Ch 12, "A Bill of Rights for Australia".

²⁸ *Ibid.* Ch 9, "The Convention model for the republic".

²⁹ *Ibid.* Ch 2.

³⁰ See for example, *Ibid.* p 327.

Owen's "strict and complete legalism".³¹ In this regard, the current Chief Justice of Australia, Murray Gleeson, recently said:

"There are some commentators who divide the judicial world into two parts, "progressive" and "conservative", and award congratulations according to the use of such labels. To those who admire "progressive" judges, a contribution is a decision that changes the law. The greater the change, the greater the contribution. To others, a contribution is a decision that reasserts established principle, although some change, preferably minimal or "incremental", is accepted. Opposing camps adopt slogans, designed, like medieval battle colours, for easy recognition of friends and enemies."³²

This reflects a tendency to oversimplify the debate on judicial method. Those tempted to hail Sir Anthony as one of the progressives and denounce Sir Owen as a conservative would do well to read *The Mason Papers*. Instead of battlelines drawn, they would find thorough, careful and balanced attempts to articulate and develop judicial method.

The author has a predictable complaint. There is virtually no mention in *The Mason Papers* of Sir Anthony's work as one of the Non-Permanent Judges (NPJs) of Hong Kong's Court of Final Appeal.³³ He has arguably been the most significant NPJ, participating in some of the weightiest decisions made by the Court since its establishment. Those decisions have, on occasions, been very controversial, inevitably raising issues as to the proper role of the courts, in a different cultural context. Sir Anthony has written several pieces about this stage of his career.³⁴ Perhaps one of these should have been included in the book.

However, at this point, Sir Anthony's own words resonate. In his toast to the contributors of the wonderful *Oxford Companion to the High Court*, he said:

"A Companion is very much a strange beast in the world of publications. It presents a close-up of the trees without ever aspiring to a panorama of

³¹ *Ibid.* pp 2-3.

³² M. Gleeson, "Australia's Contribution to the Common Law", Speech delivered to Singapore Academy of Law, 20 September 2007, available at http://www.hcourt.gov.au/publications_05.html (visited 16 June 2008).

³³ Lindell, *Mason Papers*, (n 15 above), "Biographical Details", p 219.

³⁴ See A. Mason, "The Hong Kong Court of Final Appeal" (2001) 2 *Melbourne Journal of International Law* 216; A. Mason, "The Role of the Common Law in Hong Kong" in J. Young and R. Lee (eds), *The Common Law Lecture Series 2005* (Hong Kong, HKUP, 2006); A. Mason, "The place of comparative law in the developing jurisprudence on the rule of law and human rights in Hong Kong" (2007) 37 *HKLJ* 299.

the forest. Its selection of the trees has a random quality about it, leaving the reader to wonder why we have a snapshot of some trees when others have been omitted. And a Companion is tantalizing because it gives you tidbits of information without satisfying your thirst for more".³⁵

Thus, like a Companion, *The Mason Papers* cannot meet every need and should not necessarily be criticized for the shortfall. Indeed, there are occasions where it is Sir Anthony himself who, somewhat mischievously, withholds information. He mentions that his private papers will one day be released, possibly revealing the inner workings of the High Court.³⁶

Such a step has spawned judicial biographies of Sir Owen Dixon in Australia³⁷ and Chief Justice Brian Dickson in Canada.³⁸ Hopefully, this will recur in Sir Anthony's case, supplementing the enjoyable experience of *The Mason Papers* with a comprehensive portrait of his time in Australian and Chinese public life.

Oliver Jones*

³⁵ Lindell, *Mason Papers*, (n 15 above), pp 361-362.

³⁶ *Ibid.* p 361.

³⁷ Ayres, *Dixon* (n 2 above).

³⁸ R. Sharpe and K. Roach, *Brian Dickson: A Judge's Journey* (Toronto, UTP, 2003).

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